IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 7662 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SRIPRAKASH GANPATRAI KEJRIWAL - Applicant(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR LR PATHAN for Applicant(s) : 1,MR MOHD.HANIF SHAIKH for Applicant(s) : 1,
MR KT DAVE ADDL.PUBLIC PROSECUTOR for Respondent NO.1,
NOTICE SERVED for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 30/11/2007

ORAL JUDGMENT

1. Present application has been field by the applicant –

original accused under sec.482 of the Code of Criminal Procedure to quash and set aside the complaint filed by the respondent No.2 - original accused herein, being Criminal Case No.1033 of 2002, pending in the court of learned Judicial Magistrate (First Class), Surat for the offence under sec.138 of the Negotiable Instruments Act, 1881 (Act No.26 of 1881) (hereinafter shall be referred to as "the N.I. Act" for short).

2. A complaint came to be filed by the respondent No.2 – original complainant in the court of learned Judicial Magistrate (First Class), Surat against the applicant – original accused for the offence under sec.138 of the N.I. Act, alleging inter-alia that three cheques bearing Nos.312569, 312568 and 312570, dtd.29/6/2002 were issued by the applicant in favour of the complainant which came to be deposited on 4/7/2002. However, the same came to be dishonoured with an endorsement of "insufficient fund". It was further alleged in the complaint that thereafter statutory notice as contemplated under

sec.138 of the N.I. Act came to be issued upon the applicant - accused on 9/7/2002 and inspite of the service of the said notice, the amount under the cheques were not paid and therefore, it is alleged that the applicant - accused has committed an offence under sec.138 of N.I. Act. The said complaint came to be filed on 7/8/2002 which came to be registered as Criminal Case No.1033 of 2002 and thereafter, learned Judicial Magistrate (First Class), Surat passed order on 7/8/2002 issuing process / summons upon the applicant for the offence under sec.138 of N.I. Act and hence the applicant has preferred present application for quashing and setting aside the aforesaid complaint filed under sec.482 of the Code of Criminal Procedure.

3. The learned advocate appearing on behalf of the applicant has made only one submission that the cheques in question were returned by the bank on 4/7/2002 and thereafter all the cheques were again presented by the applicant in the bank on 5/8/2002

and therefore, the complainant has waived his right to lodge complaint on the basis of notice dtd.9/7/2002 and as the complainant has waived his right by representing the cheques again after issuance of the notice, the impugned complaint is not maintainable and therefore, it is requested to quash and set aside the impugned complaint.

4. The application is opposed by Mr.K.T. Dave, learned Addl. Public Prosecutor and it is submitted that the cheques in question were returned by the bank with an endorsement of “insufficient fund” by Bank Advise dtd.4/7/2002 and statutory notice as required under sec.138 of the N.I. Act was issued upon the applicant - accused on 9/7/2002 and the impugned complaint came to be filed on 7/8/2002 i.e. within the prescribed period of limitation as contemplated under sec.142 of the N.I. Act. It is, therefore, submitted that merely because the cheques were deposited again, when the impugned complaint has been filed within the prescribed period of limitation on the basis of the first notice, it cannot be said that

there is a waiver or the impugned complaint is not maintainable.

5. He has relied upon the decision of the Hon'ble Supreme Court in the case of Prem Chand Vijay Kumar Vs. Yashpal Singh and another, reported in (2005) 4 SCC 417. It is also further submitted by him that even otherwise the present petition is required to be dismissed on the ground of delay and laches, as the impugned complaint is of 2002 and the summons came to be issued by the learned Judicial Magistrate (First Class), Surat in the year 2002 and the present application has been filed by the applicant in the year 2007 i.e. after a period of about five years, without any explanation with regard to delay. Under the circumstances, it is requested to dismiss the present application.

6. Heard the learned advocates appearing on behalf of the respective parties.

7. As stated above, the only submission made on behalf

of the applicant is that after issuance of the statutory notice dtd.9/7/2002, cheques were again presented in the bank on 5/8/2002, thereby the complainant has waived his right to lodge the complaint on the basis of the notice dtd.9/7/2002 and therefore, the impugned complaint is not maintainable on the basis of the notice dtd.9/7/2002. It is required to be noted that as per sec.138 of the N.I. Act, anywhere any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, or any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence. However, the cheque must have been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity which is earlier and

the payee or the holder in due course of the cheque, as the case may be makes an demand for the payment of the said amount of money by giving a notice in writing to the drawer of the cheque within 30 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid and the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

As per sec.142 of the Act, no court shall take cognizance of any offence punishable under sec.138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque and such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to sec.138.

8. Therefore, after completion of 15 days from the date

of receipt of the notice as contemplated under sec.138 (b)of the N.I. Act, if complaint is filed in the court within a period of one month, the said complaint is maintainable. In the present case, statutory notice as contemplated under sec.138(b) of the N.I. Act has been issued on 9/7/2002 and the impugned complaint has been filed on 7/8/2002 i.e. within stipulated period of limitation as provided under sec.138 read with sec.142 of the N.I. Act.

9. As observed by the Hon'ble Supreme Court Prem Chand Vijay Kumar (supra), if dishonour of a cheque has once snowballed into a cause of action it is not permissible for a payee to create another cause of action with the same cheque and the period of one month for filing the complaint will be reckoned from the day immediately following the day on which the period of fifteen days from the date of receipt of the sate of notice by the drawer expires.

In the present case, when the impugned complaint has been filed within the stipulated period

of limitation as contemplated under sec.142 of the N.I. Act, merely because in between period of one month from the date of statutory notice, the complainant has again deposited the cheque, it cannot be said that there is a waiver and he cannot file the complaint within the prescribed period of limitation as contemplated under sec.142 of the N.I. Act on the basis of the notice. There is nothing like waiver. The law gives right to the complainant to file complaint within a period of one month from the date of receipt of the statutory notice as contemplated under sec.138 of the N.I. Act and nobody can take away that right of filing complaint within the prescribed period of limitation as contemplated under sec.142 of the N.I. Act. The things would have been different if after issuance of the notice dtd.9/7/2002, the complainant had not filed the complaint within 30 days from the date of receipt of the notice and again deposited the cheque after one month and then further notice is issued and on the basis of subsequent notice the complaint is filed. That is not the case here. As stated above, in

the present case the impugned complaint has been filed within 30 days from the date of receipt of the statutory notice i.e. within the prescribed period of limitation as provided under sec.142 of the N.I. Act. Under the circumstances, submission of the applicant cannot be accepted and the impugned complaint is not required to be quashed and set aside in exercise of powers under sec.482 of the Code of Criminal Procedure. If the Submission of the learned advocate appearing on behalf of the applicant is accepted, in that case, the complainant would be rendered remedyless. Even otherwise, the present petition is required to be dismissed on the ground of delay and laches, as the impugned complaint has been filed in the month of August, 2002 and the learned Judicial Magistrate (First Class), Surat has issued process / summons in the month of August, 2002 and he present application has been filed in the year 2007 i.e. after a period of about 5 years, without explaining the inordinate delay.

10. For the reasons stated above, the application deserves to and is accordingly dismissed. Rule is discharged.

(M.R. SHAH, J.)

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